

It will be seen therefore that even a historical survey lends support for the view taken by the Federal Court that the lands comprised in the indentures were lands alienated before the commencement of the Code within the ambit of section 102 of the Code.

Apart from this one point which possibly was not canvassed in Special Case No. 1 of 1973, all other arguments of Mr. Lim were considered and answered by the Federal Court. He however contended that I should not regard this decision as binding. It was in the first place *obiter*, because the reference should not have been made at all, as even the Federal Court acknowledged. But the parties submitted to the determination and the Federal Court which has original jurisdiction in such a reference, accepted the task. With respect therefore I cannot presume to regard the decision as *obiter*. Nor can I regard it a *per incuriam*. Moreover the decision appears to approve, in the result, the reasons given by me in my judgment in the *Oriental Holdings*' case.

As for the conveyancing difficulty seen by Encik Abu Talib in the answer to the third question, the consideration whether this question arose necessarily for the determination of the Federal Court in the issue before it in Special Case No. 1 of 1973, which was whether the subsidiary legislations were validly made and applicable to the applicants' land held under an indenture is for the same reasons not for me to ponder. Nor fortunately is the question whether the answer lies in legislative amendment or in any effective means whereby the Federal Court can depart from its own decision.

For the reasons given above and following the decision of the Federal Court, the action is dismissed with costs.

Action dismissed.

Solicitors: *Lim Kean Chye & Co.*

PUBLIC PROSECUTOR v. TEOH HOCK HAI

[R.Cr.J. (Chang Min Tat J.) July 12, 1974]
[Penang — Criminal Revision No. 8 of 1974]

Criminal Law and Procedure — Employee driver charged with offences in connection with driving of a vehicle which was not licensed and not insured — Whether responsibility of employee — Road Traffic Ordinance.

In this case the respondent who was employed as a driver had been convicted of various offences in connection with the driving of a motor vehicle which was not licensed and not insured.

Held: as the driver employee was not responsible for the licensing or insuring of the vehicle it is undesirable to charge him and in this case the convictions should be set aside and the fines refunded and the respondent admonished and discharged.

Cases referred to:-

- (1) *Yap Yoke Sam v. Public Prosecutor* [1955] M.L.J. 114.
- (2) *Public Prosecutor v. Chuan Keat Chan Ltd.* [1973] 1 M.L.J.

A CRIMINAL REVISION.

T. Selventhiranathan (Deputy Public Prosecutor) for the applicant.

Goh Lim Eam for the respondent.

Chang Min Tat J. (delivering oral judgment): This case was brought to my notice by an anonymous letter. The purpose of the letter was not to seek from me the order that I now propose to make. It was obviously written for a sinister motive by somebody who had obviously a very sick mind.

This is a case where a driver, an employee, was charged with various offences in connection with the driving of a vehicle which was not licensed and not insured. The notice of the magistrate was not drawn to the case of *Yap Yoke Sam v. Public Prosecutor*⁽¹⁾ where the facts are on all fours. It is only necessary for me to read the judgment of Buhagiar J. in that case to explain why I now propose to make the order that I shall be doing shortly.

I herein quote:

"The learned counsel for the appellant conceded that technically the appellant has committed the offences in question but submitted that he should not have been charged with these offences; he submitted that the appellant is only an employee and as such he is not responsible for obtaining a haulage permit or for seeing that a third party risk insurance policy is in force for the use of the vehicle for commercial purposes; furthermore as the person whose duty it was to see to such things was charged, the charges against the appellant amounted to a multiplicity of charges. The learned counsel referred me to the case of *Carpenter v. Campbell & Ors.* where Lord Goddard held that although it is technically correct for a summons to be issued against the driver of the unlicensed vehicle, this course tends to be oppressive and is undesirable where the driver is the employee of the owner and not responsible for the licensing of the vehicle. In that case the case was sent back to the justices to convict the company (the owner of the unlicensed vehicle) and the justices were directed to give an absolute discharge to the driver. Lord Goddard added: 'and I hope that persons who are responsible for these prosecutions will not in similar cases multiply summonses in this way, but will serve the people responsible and not the people who are not responsible'."

I follow Buhagiar J. in agreeing with Lord Goddard.

Mr. Goh Lim Eam for the respondent drew my attention to this passage from the judgment of the Federal Court in *Public Prosecutor v. Chuan Keat Chan Ltd.*⁽²⁾ at page 250:

"We should, however, like to add a rider; we do not think it right or proper or that it serves any purpose for the driver carrying out or disobeying the instructions of his employer also to be prosecuted. The principle to be applied is respondeat superior and it is true to say that invariably the employer has been paying his driver's fine. The only possible exception would be where the driver takes out a vehicle for his own private gain, using it without the owner's knowledge, consent or connivance; in which case, the proper person to be prosecuted should be the driver himself and no reflection cast on the owner if by evidence produced, he can exonerate himself."

I have ascertained that the employers have been adequately dealt with and for the same reasons I now set aside the convictions and order that the fines if paid be refunded and admonish and discharge the respondent under section 183(2)(a) of the Criminal Procedure Code.

Conviction set aside.

Solicitors: *Lee Kok Liang & Co.*